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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC.,
Appellant,

vs.

WILLIAM WILSON, as Commissioner of Housing and Buildings of the City of New York.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

George G. Lake,
Counsel for Appellant.

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COURT OF APPEALS OF THE STATE OF NEW YORK

OCTOBER TERM. 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC.,
Plaintiff-Appellant.

vs.

WILLIAM WILSON, AS COMMISSIONER OF HOUSING AND BUILDINGS OF THE CITY OF NEW YORK,
Defendant-Respondent-Appellee.

STATEMENT AS TO JURISDICTION PURSUANT TO RULE XII OF THE RULES OF THE UNITED STATES SUPREME COURT.

This is an appeal from a final judgment upon reargument of the Court of Appeals of the State of New York, which is the highest Court of the State of New York, in a case in which there was drawn in question the validity of a statute of the State of New York, which was attacked on the ground of its being repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States.

This action was originally started in the Supreme Court of the State of New York, County of New York. In the State of New York, the Supreme Court is the Court of first instance. Appeals from the Supreme Court are taken to the Appellate Division of the Supreme Court and thereafter to the Court of Appeals of the State of New York. The

purpose of the present action was to enjoin defendant, as Commissioner of Housing and Building of the City of New York, from putting into effect Section 4 of Chapter 553 of the 1944 Laws of New York, insofar as said statute was sought to be applied to plaintiff's building. The complaint likewise asks for a declaratory judgment declaring said statute unconstitutional.

After issue was joined by service of an answer, defendant moved for judgment on the pleadings. This motion was granted, and a judgment was entered dismissing the complaint on motion, and without any proof having been taken. Plaintiff thereafter appealed to the Appellate Division of the Supreme Court for the First Judicial Department which likewise unanimously affirmed without opinion (269 A. D. 691). Plaintiff thereafter appealed to the Court of Appeals of the State of New York which likewise affirmed without opinion (294 N. Y. 917).

Plaintiff thereafter, and on October 15, 1945 moved the Court of Appeals of the State of New York for reargument, and if the same be denied, then for a certificate to the effect that a question under the United States Constitution was presented and passed upon. By its final judgment dated October 25, 1945, the Court of Appeals of the State of New York denied the application for a reargument but amended its prior judgment and remittitur by adding thereto the following:

> "A question under the Constitution of the United States was presented and necessarily passed upon. The appellant contended that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, is violative of, and repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States. This Court held that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, is not violative

of, or repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States."

Statutory Provision as to Jurisdiction

This appeal is taken under Section 344 of Title 28 of the United States Code, which is likewise Section 237 of the Judicial Code. This section provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision in favor of its validity, may be reviewed by the Supreme Court of the United States upon appeal.

Statute of the State Involved

The statute of the State involved is Section 4 of Chapter 553 of the New York laws of 1944. The statute went into effect on April 5, 1944. The statute reads in part as follows:

> "Lodging houses of non-fire proof construction existing prior to the enactment of this subdivision, shall comply with the following conditions:"

The conditions themselves are fully set forth in the papers on appeal herein at pages 19 at folios 55 to 69 inclusive, of the papers on appeal. The pertinent provisions of said section are to the effect that certain wood work be removed; that the entire building be provided with an automatic wet pipe sprinkler system; that the entrance halls be fire retarded; that all doors opening on the entrance halls be self-closing fire proof doors; that the cellar ceiling be fire retarded; that wood partitions be removed or protected with incombustible material; that main aisles be three feet in width; that exit signs be put up; that there be a scuttle or bulkhead at the top story; that two remote means of

egress be provided; that all openings have automatic self-closing fire proof doors; that a completely enclosed room be used for storage with fire resistive partitions; that metal containers be provided with self-closing lids for garbage; that ceiling and floors adjoining any furnace be fire retarded; that no insecticide be stored without a permit from the fire department; that the top of every cubicle shall be at least two feet from the ceiling and that all parts of every lodging house shall be inspected by a clerk or a watchman every two hours.

Most of the above statute does not apply to plaintiff's building, which at the time of its construction was already built in accordance with these directions. The important provision which does apply to plaintiff's building is that providing for the installation of a wet pipe sprinkler system for the entire building.

Date of Judgment or Decree Sought to Be Reviewed

The date of the final judgment of the Court of Appeals of the State of New York sought to be reviewed is October 25, 1945. The date upon which the application for appeal is presented to the Chief Judge of the Court of Appeals of the State of New York is December 8th, 1945.

Opinions Delivered in Courts Below

No opinion was ever delivered by any Court below in acting upon the present case or any appeal therein.

Substantiality of Questions Involved

The folio numbers hereafter given are folio numbers of the papers on appeal before the Court of Appeals of the State of New York. The complaint herein alleged that plaintiff was the owner and operator of a lodging house known as Clover Hotel, located at 312-314 Bowery, Bor-

ough of Manhattan, City and State of New York. This was a four story brick building erected in 1940, having a frontage of approximately fifty feet and a depth of one hundred feet. A certificate of occupancy for the building was issued by the City of New York on January 15, 1941. The building was built in accordance with the latest and most improved methods of construction and was in every respect safe and proper for occupancy as a lodging house. The building contains only open dormitories and has no cubicles. The first tier of beams is fireproof; the building is equipped with an open circuit fire alarm system throughout the building; a completely enclosed fireproof stair exit; and a fire escape as well as a fireproof passage way from the rear yard to the street; and the building has constant watchman service. The complaint further set forth that there were many inferior lodging houses prior to 1929. In 1927, the Legislature of the State of New York appointed a Commission which thereafter reported to the Legislature.

In 1929, Chapter 713 of the Laws of New York was adopted, which is known as the Multiple Dwelling Law. This law laid down certain stringent regulations for the construction of buildings and for safety measures. All houses built since 1929 including plaintiff's building, are in every respect proper; comply with the stringent regulations of law, and do not constitute a fire hazard. There have in fact never been any fires or loss of life, in plaintiff's building or those similar to it.

In 1944, Chapter 553 of the Laws of 1944 was adopted which by its terms directed certain expensive alterations in all lodging houses existing at the time that the Chapter was adopted. This law made no effort to distinguish between the old fire hazard buildings, known as "flop houses," and plaintiff's present modern building, nor did the law, which went into effect on April 5, 1944 make any similar

provisions for inferior existing buildings thereafter to be converted to lodging houses (which could be done under the law simply by filing plans), or identical lodging houses thereafter to be built.

The complaint at folio 41 alleged that there had been no change in method of building construction or safety measures since 1929, and further alleged that plaintiff's building was worth approximately $25,000; that the cost of complying with the applicable part of the law would be approximately $7,500, and that any possible benefit obtained would be negligible, and completely unreasonable and confiscatory with reference to the benefit to be obtained. The complaint therefore at folio 45 stated that the law as applied to plaintiff's building, was unconstitutional and void by reason of the fact that the same was discriminatory, unreasonable and confiscatory. At folio 49, judgment was therefore asked declaring the law null and void insofar as it applied to plaintiff's building and buildings similarly situated, and enjoining the defendant from attempting to apply the law to plaintiff's building and buildings similarly situated. The question under the Constitution of the United States was therefore raised directly in the complaint. Under the law of the State of New York, pleadings are to be liberally construed. Section 275 of the New York Civil Practice Act, provides as follows:

> "*Construction of pleadings.* Pleadings must be liberally construed with a view to substantial justice between the parties."

Defendant filed its answer in the Supreme Court of the State of New York, and applied for judgment on the pleadings, dismissing the complaint on motion. The law of the State of New York with reference to such motion is set forth in the case of

Loewinthan v. *Beth David Hospital et al.*, 9 N. Y. S. 2nd 367 at page 369.

"On a motion for judgment on the pleadings, just as on a motion to dismiss a complaint before answer for insufficiency, every intendment and fair inference must be attributed to the allegations of the complaint (Dyer v. Broadway Central Bank, 252 N. Y. 430, 432, 169 N. E. 635; Hurwitz v. Hurwitz, 216 App. Div. 362, 215 N. Y. S. 184; Moore v. Bonbright & Co., Inc., 202 App. Div. 281, 195 N. Y. S. 854) to determine whether a cause of action may be spelled out."

The Court below granted judgment on the pleadings and dismissed the complaint. Judgment to that effect was entered (folios 7-9). An appeal was taken to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, where the same questions were raised (folios 4-6). The Appellate Division affirmed unanimously (folios 120-123). An appeal was taken to the Court of Appeals (folios 109-114). In the Court of Appeals, appellant's brief contained the following statement at page 5:

"In the present buildings, the walls, stairs, stair enclosures and the first tier of beams are fireproof. The upper tiers are not fireproof, but have a fire resistance of approximately one hour. That is the only essential structural difference between this building and a fireproof building. This building is in all respects similar to the fine six-story apartment houses, such as are found on the Grand Concourse, in the Borough of the Bronx, or on Ocean Avenue, in Brooklyn.

As a matter of fact the present building already complies with most of the provisions of Section 353 of the Laws of 1944 (43).

It is alleged in the complaint that no fire has occurred in any lodging house built since 1929 in which there was any loss of life (41), and a check-up shows that no fire of any kind has ever occurred in these buildings."

The brief further pointed out at page 6 concerning the invalidity of the statute:

> "It is respectfully submitted that the statute in question is void under the above provision, by reason of the fact that while certain expensive installations are required by the statute to be made in existing buildings, there is no similar provision for identical buildings thereafter to be built or converted."

The motion for a reargument before the Court of Appeals contained the following points:

> "The statute is unconstitutionally discriminatory."
> "The statute is unconstitutionally confiscatory and unreasonable, as applied to plaintiff's lodging house."
> "The issues of whether the classification is proper and reasonable and of whether the statute is confiscatory are matters on which plaintiff should be given an opportunity to present the evidence at a trial, and should not have been decided summarily upon defendant's motion to dismiss the complaint."

The Court of Appeals of the State of New York has further certified that a question under the Constitution of the United States was presented and necessarily passed upon, and that the decision was in favor of the validity of the statute.

It would be well to consider the factual situation concerning lodging houses in the City of New York. Practically all of these are centralized upon a street famed in song and story known as The Bowery, and practically all of these lodging houses extend over the Bowery for a distance of approximately one mile beginning at Chatham Square. There are practically no empty lots within this district, and while it is occasionally possible to buy lots and erect a new building, as plaintiff did, most lodging houses which will hereafter come into being would be as a result of the con-

version of existing buildings, not formerly lodging houses. These are mostly old buildings, which are not fireproof or fire resistant. They may neyertheless be converted to lodging houses under Section 8 of the Multiple Dwelling Law of the State of New York, which provides in part as follows:

> "A building not a dwelling if hereafter converted or altered to a multiple dwelling shall thereupon become subject to all the provisions of this chapter relative to dwellings of like class and kind hereafter erected."

However, a hereafter erected building, would not be a building which was a lodging house existing prior to the enactment of Chapter 553 of the Laws of 1944, and would not therefore be subject to the provisions of the statute attacked. The practical result of this statute is consequently to permit any person who desires to compete with plaintiff to erect or convert a building immediately adjacent to plaintiff, which building would not have to comply with Chapter 553 of the Laws of 1944, and which building would not therefore have the safety measures required by that statute and in particular, would not require the owner of the converted building to expend 37½% of the value of the building upon a sprinkler system. The injustice of the statute is therefore manifest.

The Multiple Dwelling Law deals with old law tenament houses built prior to 1901; new law tenament houses built subsequent to 1901 and prior to 1929; converted dwellings; and with houses hereafter to be erected, which are houses built subsequent to 1929 and thereafter. Each one of these classes of houses falls into a separate category under the Multiple Dwelling Law, and requirements vary in each case. There is no attempt under the Multiple Dwelling Law itself to lump all these houses together, and there has been no general legislation concerning multiple dwellings since the enactment of the Multiple Dwelling Law in 1929.

The brief upon reargument before the Court of Appeals of the State of New York, pointed out that the statute was discriminatory because it enabled persons similarly situated; namely, persons who might purchase old buildings adjacent to plaintiff or erect new buildings, to build buildings similar to that of plaintiff, without the necessity of complying with the onerous provisions of Chapter 553 of the Laws of 1944. Such a distinction can be sustained only in the presence of special circumstances as in

Tigner v. *Texas*, 310 U. S. 141,

but is otherwise invalid.

Fisher v. *Borough Council of Borough of South Toms River*, 13 New Jersey Miscellaneous 852, 181 Atlantic 630;

Michigan Lake Building Corporation v. *Hamilton*, 340 Ill. 284, 172 Northeastern 710;

Dowsey v. *Village of Kensington*, 257 N. Y. 221;

City of Vincennes, Ind. v. *Marland Refining Co.*, 33 Fed. 2nd 427.

This general rule is well set forth in the case of

Cowan v. *City of Buffalo*, 247 A. D. 591, 288 N. Y. S. 239,

as follows:

> "A statute or ordinance which amounts to a denial of the equal protection of the law to persons within the jurisdiction of the lawmaking body must be deemed unconstitutional and void, even if it is passed under the guise of the police power. Dobbins v. Los Angeles, 195 U. S. 233, 237, 25 S. Ct. 18, 49 L. Ed. 169; Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. Ed. 23; Missouri, Kansas & Texas R. Co. v. Haber, 169 U. S. 613, 626, 18 S. Ct. 488, 42 L. Ed. 878; Sinnot v. Davenport, 22 How. 227, 243, 16 L. Ed. 243."

A statute of the character of the present must be construed on the basis of what may be done, and not what has been done.

Riglander v. *Star Company*, 98 A. D. 101 at page 108, 90 N. Y. S. 772;

People v. *Simonian*, 173 Misc. 131, 18 N. Y. S. 2nd 371.

The conclusion is inescapable that the actual effect of the statute attacked was as if it read that all buildings used as lodging houses on April 5, 1944, have to put in an automatic wet pipe sprinkler system, while all other existing buildings which might thereafter be converted to lodging houses, and indeed might be the next day, need not, even though actually inferior in construction. The effect of this is to make the date of April 5, 1944 the determining factor as to whether the statute need or need not be complied with, and this date bears no relation whatsoever to the condition attacked. Such enactment is unconstitutional.

Mayflower Farms, Inc. v. *Ten Eyck*, 297 U. S. 266 at page 274.

The complaint in the present action likewise alleged that the statute attacked was confiscatory as applied to plaintiff's building. The complaint alleged and the briefs argued that there was no necessity however for the legislation, and that to comply with the legislation would cost $7,500 in a building worth $25,000, without any appreciable benefit or necessity. The New York Law on this subject was reviewed in the case of

Adamec v. *Post*, 273 N. Y. 250 at page 256,

as follows:

"Even so, as the court pointed out in Health Department of City of New York v. Rector, etc., of Trinity Church, supra, 145 N. Y. 32, at page 41, 39 N. E. 833, 836, 27 L. R. A. 710, 45 Am. St. Rep. 579, the discretion

of the Legislature is not absolute. "The improvement or work must in itself be a reasonable, proper and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public." In the same case the court quoted with approval from the opinion of Mr. Justice Holmes, speaking for the Supreme Court of Massachusetts in Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, a L. R. A. 81, 12 Am. St. Rep. 560: "It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain."

The same rule as set forth above concerning the large expense and small benefit, was laid down by the United States Supreme Court in an opinion by Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393.

The *Pennsylvania Coal Co.* case is likewise appropriate by reason of another question in this appeal. There are about two hundred lodging houses in New York City, which were in existence in 1929, when the Multiple Dwelling Law was adopted. As to these lodging houses, no question has been raised as to the constitutionality of the statute attacked. The attack as to the constitutionality applies only to a half-dozen or so lodging houses built since 1929, which are constructed pursuant to entirely different laws, and whose construction is wholly superior and dissimilar. However, the fact that only a small number of houses is involved,

was not thought to be an objection by Mr. Justice Holmes, in the *Pennsylvania Coal Co.* case, in which only one house was involved.

It is further the rule that if some special circumstances be claimed justifying the distinction between existing buildings and existing buildings not then used as lodging houses but which might thereafter be converted to lodging houses, such reason should be shown at a trial, and not merely on a motion to dismiss the complaint,

Barden's Farm Products Company, Inc. v. *Baldwin*, 293 U. S. 194.

In prior New York cases where a statute has been attacked as confiscatory, the courts have invariably granted a hearing, and not simply disposed of the case on motion.

Cockroft v. *Mitchell*, 187 A. D. 189, Affirmed without opinion, 230 N. Y. 630;

Health Department v. *Rector*, 145 N. Y. 43;

Tenement House Department v. *Moeschen*, 179 N. Y. 325, 203 U. S. 383.

As we have pointed out, the small building involved is practically fireproof; has ample means of egress; has a permanent fire alarm system and constant watchman service; and has no cubicles, which have been a fire danger. No automatic wet pipe sprinkler system, costing a large and confiscatory sum is necessary in this or similar buildings, whatever the case may be as to old buildings.

From the above, it is respectfully submitted that the questions involved in this appeal of discrimination and confiscation are substantial.

Respectfully submitted,

GEORGE G. LAKE,
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